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## State Appellate Courts and the Political Process: Florida and the Public Forum

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# STATE APPELLATE COURTS AND THE POLITICAL PROCESS: FLORIDA AND THE PUBLIC FORUM

D. GRIER STEPHENSON, JR.\*

*In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.<sup>1</sup>*

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## I. INTRODUCTION

Ever since Robert Yates penned his objections to the proposed Supreme Court of the United States in *The Letters of Brutus*,<sup>2</sup> scholars and journalists, lawyers and politicians have devoted page after page of book after book to this tribunal. Today, even a mediocre library contains dozens of biographies of justices, analyses of their decisions, and commentaries on Court procedures. The Court has fascinated Americans and mystified foreigners, and perhaps no other institution in the land has attracted so much deification, vilification, praise and abuse for so long a time and from so many different corners of society. From varying perspectives the Court has appeared in American constitutional history as both savior and destroyer, hero and villain, protector and ravager. The Court, then, has suffered from no want of attention.

For all the interest in this tribunal, very little attention has focused on the fifty state appellate court systems in the United States. Scholars have traditionally devoted more of their time to the national government than to the labyrinth of state governments. Even within the study of state governments, writers and researchers have spared only a relatively few

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1. Jeremiah Black, counsel for petitioner, *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 75-76 (1866).

2. The letters are contained as an appendix in E. CORWIN, *COURT OVER CONSTITUTION* 231-262 (1938).

pages to state court systems. A glance through any one of several textbooks on state and local government usually reveals at the most two chapters on the judiciary, and some offer only one.<sup>3</sup>

At this point, one might suggest that if scholars have generally neglected state courts over the years, the neglect has been deserved.<sup>4</sup> The inference is that state courts have so little to do with matters of import that serious researchers might better spend their energies on cases and institutions where judges grapple with the central issues of the time and make crucial decisions which affect the lives of millions. The argument is sound, but the application is faulty.

The point is that in this country the Supreme Court makes political, *i.e.*, policy, decisions. Do state courts? The indications are that state courts are very much involved in the policy life of the country, for state courts make or fail to make decisions which affect their jurisdictions. No one can deny that the state trial and appellate courts handle millions of cases every year involving such important matters as crimes, contracts, insurance, torts, corporations, and estates. Decisions in these areas apply, re-shape and create rules governing hundreds of millions of dollars and millions of persons.<sup>5</sup>

Even admitting the policy implications of state court decisions, one might question the wisdom of studying one or several state supreme courts rather than the United States Supreme Court. Knowledge of the rulings from the state benches is crucial for a lawyer, but of what significance is it to the student of politics? If one wishes to study the ways in which courts function, why not concentrate one's labors on the United States Supreme Court rather than examine the less glamorous and often more obscure actions of state courts?

Such a query suggests that what one knows about a single American court—here, the Supreme Court—might just as easily be applied to an-

3. In one of the more recent textbooks, less than twenty out of five hundred pages are devoted to state courts. The example is the rule, not the exception. *See* DEMOCRACY IN THE FIFTY STATES (C. Press & O. Williams, eds., 1966). But since the book is a collection of readings, perhaps the blame for the scarcity of published material on state courts should not fall on the editors.

4. Of course, books and articles on state courts are not entirely lacking. Some studies, for example, have demonstrated how state courts have responded to social and economic needs over time. *See* J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN 19TH CENTURY UNITED STATES (1956) and THE GROWTH OF AMERICAN LAW: THE LAWMAKERS (1950).

Some scholars have applied the more "scientific" tools to the study of state courts. *See* G. Schubert, *The Packing of the Michigan Supreme Court*, in QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 129-141 (1959); Keefe, *Judges and Politics: The Pennsylvania Plan of Judge Selection*, 20 U. PITT. L. REV. 621 (1959); Nagel, *Sociometric Relations Among American Courts*, 43 S.W. Soc. Q. 136 (1962); Nagel, *Unequal Party Representation on the State Supreme Courts*, 45 J. AM. JUD. Soc'y 62 (1961); Mott, *Judicial Influence*, 30 AM. POL. SCI. REV. 295 (1936); Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352 (1962).

Historical studies include, M. NELSON, A STUDY OF JUDICIAL REVIEW IN VIRGINIA, 1789-1928 (1947); F. SMITH, JUDICIAL REVIEW OF LEGISLATION IN NEW YORK, 1906-1938 (1952).

5. The probability is that state courts affect and effect policy, "not as a matter of choice, but of function." J. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 3 (1955).

other court, state or federal, in the American political system. But there is little evidence that what is true of one court is necessarily true of another. Granted the policy significance of state courts, one is justified in analyzing their actions and inactions if the chance exists that knowledge about the Supreme Court is not necessarily knowledge about the fifty state appellate court systems in the United States.

In this light, this article studies public forum cases before the state appellate judiciary of Florida.<sup>6</sup> From an examination of leading cases in the law of the public forum in Florida, the author then offers several conclusions and hypotheses relating to the operation of state courts generally.<sup>7</sup> The author makes no claim to complete understanding of state judiciaries from an analysis of a series of cases in a single state. However, the reaction of the Florida appellate courts to cases involving the public forum does highlight the common points of the role of the state judiciary in the American political system and the policy implications of the actions and inactions of state courts.

## II. PUBLIC PROPERTY AS A PUBLIC FORUM

### A. *The Public Pathways*

#### 1. POLITICAL EXHORTATIONS

The use of streets and parks for expression of one's ideas has been a part of American political history since the early years of the Republic. The town meeting in New England and the courthouse rally in the South have brought citizens together to hear neighbors and long-winded politicians speak on the issues, fears and hopes of the day. The campaign barbecue, the sidewalk sermon, and the Fourth of July oration have held forth on the streets and parks across the land, each reflecting in a special way some aspect of the American culture.

The accessibility of this ready-made public forum provides more than a political safety valve, however, for the hot air of community complainers, cajolers and candidates. The forum can be the germination point for the introduction of new ideas in a locale. So long as a community remains relatively homogeneous, perhaps some citizens take for granted the public forum within their midst. But when disturbingly new and conflicting ideas make their appearance, the public forum becomes a fertile ground in which dissident and revolutionary elements can prosper. In the South following the Civil War, many notions foreign to the people paraded before the public eye. Socialism and Darwinism stepped onto the

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6. As applied here, "public forum" includes picketing, meetings and demonstrations on public property, usually on streets and in parks. The term excludes similar actions on private property, such as most of the segregation "sit-ins." Detailed treatment of most labor picketing cases is omitted, since the study of labor law has traditionally been separate from that of the public forum.

7. The author interviewed judges and attorneys as part of his research. No specific citations are given to the interviews, however, for anonymity was usually a precondition of frank discussion.

Southern stage, and the political turmoil after 1865 produced rivalry among more traditional ideologies such as populism, democracy, and republicanism.

The influx of new ideas and the rejuvenation of old ones had even more dramatic impact because of the growing urbanization of the period. Farm villages were expanding, and cities and towns were witnessing increasing congestion, as an exploding commerce out-distanced the limited capabilities of narrow streets and obsolete lines of communication. As crowding continued, regulation of street activities appeared reasonable because, after all, political and religious meetings might unduly hinder the use of the streets by pedestrian customers. And given the presence of obnoxious causes and ideas with their heralds and peddlers, the street ordinance was a convenient way to keep the prophets, the disinherited and the saviors out of public view.<sup>8</sup>

There were no early Florida appellate court cases concerning the streets as a public forum.<sup>9</sup> Municipalities had ordinances proscribing disorderly conduct, and despite a few lower court convictions for unruly out-spokenness in the streets, interest and funds were apparently insufficient for an appeal. At any rate, Floridians lacked a soapbox tradition for unpopular and seemingly threatening ideas. In the absence of such a tradition, however, there arose those political creatures more than willing to beget one. C.T. Anderson, for one, ran afoul of a Panama City ordinance in 1920 because he refused to secure a permit to speak on the streets from the city fathers.<sup>10</sup> His political convictions and his enthusiasm to share them with others cost him one hundred dollars and presented the Supreme Court of Florida with its first review of a public forum case.

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8. For a history of regulations on street and park meetings, see G. ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* (1961).

9. The United States Supreme Court at first maintained a hands-off policy with regard to state legislation regulating the public forum. See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876); *Davis v. Massachusetts*, 167 U.S. 43 (1897). The Court could do little with the question until it incorporated the first amendment into the fourteenth.

In its first free speech foray into the tangled mass of street and park ordinances, the Supreme Court voided a municipal ordinance which required a permit to distribute literature on the streets. *Lovell v. City of Griffin*, 303 U.S. 444 (1938). In *Hague v. CIO*, 307 U.S. 496 (1939), the Court struck down several ordinances which had permitted a city to exercise arbitrary control over political expression under the guise of simple police regulations.

In another series of cases, the Court refused to countenance ordinances which in effect provided municipal officials with censorship powers or which flatly prohibited all political expression on the streets or from house to house. Ordinances regulating hours for handbill distribution and requiring registration for solicitors were one thing; ordinances promoting censorship of the applicant's views or forbidding their dissemination on the streets were something else altogether. See *Schneider v. Town of Irvington*, 308 U.S. 147 (1939); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943).

10. *Anderson v. Tedford*, 80 Fla. 376, 85 So. 673 (1920). The ordinance read:

No person or persons shall hold any public meeting or meetings of any character upon any of the streets of the city or within any of the city parks without first obtaining permission in writing from the mayor or from a majority of the city councilmen.

*Id.* at 377, 85 So. at 673.

Anderson argued that the ordinance was invalid because the limitations placed upon him violated his freedom of speech. More specifically, he contended that the licensing provision placed unbridled discretion in the hands of the city officials. Mr. Justice Ellis wrote the opinion for the Florida court and dwelt almost exclusively with the second argument—the possibility of arbitrary discrimination.

Ellis accepted Anderson's characterization of the Panama City ordinance, which specified no factors for the licensing officials to consider, as unreasonable and void. He noted that such "discretion, vested in the mayor or a 'majority of the city councilmen,' is uncontrolled by any definite and reasonable terms upon which the permit may be granted."<sup>11</sup>

Those officials are empowered to grant or withhold permission to hold meetings in the streets or parks of the city without inquiring into the character of persons applying for permit, the purpose of the meeting or assembly, nor its effects upon the business, traffic, or peace and quiet of the city, but may for reasons entirely personal grant permission to any person and withhold it from another, and as the religious or political proclivities of the head of the city administration changes [sic] he may grant permission to a representative of one sect and deny it to another, and withhold permission from a person of one political faction and grant it to another of different persuasion.<sup>12</sup>

Continuing, Justice Ellis asked how one would interpret this ordinance. "All laws and regulations to be valid for any purpose must be capable of construction, but this ordinance is incapable of construction."<sup>13</sup> Interpretation depended solely on the man, for the statute itself provided no guidelines. The law thus made it possible "for an official in the name of law to violate recognized principles of legal and equal rights."<sup>14</sup>

Then, perhaps in a jibe at the mayor and council of Panama City, Ellis added:

In some municipalities governed by what they claim to be a superior system for regulation of municipal affairs, the entire business portion of the principal streets is so completely given over to use by the owners of a certain class of vehicles for parking and repairs as often to block the streets and render the use of them by the public often impossible and usually difficult

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11. *Id.* at 377, 85 So. at 673.

12. *Id.* at 377-78, 85 So. at 673-74.

13. *Id.* at 380, 85 So. at 674. The court noted here that the ordinance was also without charter authorization, but this ground for reversal was outside the broader reasoning of the opinion.

14. *Id.* But the legal process could not eliminate altogether the element of discretion. Even judges were not immune for "judges are men. And men are pretty much like all of us," Murphy, *Free Speech and the Interest in Local Law and Order*, 1 J. PUB. L. 40, 70 (1952), and, "no scheme of human policy can be so contrived and guarded but that something must be left to the integrity, prudence and wisdom of those who govern." Seabury, *Letters of a Westchester Farmer (1774-1775)*, 8 PUBLICATIONS WESTCHESTER COUNTY HIST. SOC'Y 121 (1930).

and dangerous. In comparison with such practice it would seem that a meeting of a few citizens upon a street corner to discuss some social, political or religious topic would be too insignificant to be noticed.<sup>15</sup>

Faced in the briefs with what appeared to be arbitrary enforcement of the ordinance, the Florida court was quick to remove the power from the city officials. Seeing unequal treatment in Anderson's case, the power was obviously too dangerous to assign to fallible humans without meaningful standards for application. Had the Panama City ordinance specified particular factors and conditions to guide and direct the mayor and councilmen, the Florida court might have rejected Anderson's objections. On its face, however, the ordinance contained no beacon lights for interpretation, and so the Supreme Court of Florida did to the Panama City statute in 1920 what the Supreme Court of the United States was to do to an ordinance from Griffin, Georgia, in 1938.<sup>16</sup>

The *Anderson* opinion did not explicitly indicate the court's attitude toward an ordinance which would place a blanket ban on street activity at certain places or at all places, at certain times or at all times. The opinion, however, did imply that any prohibition would have to have a reasonable relation to some tangible public or private mischief which the law sought to prevent. Presumably, a complete or partial ban so unrelated also would be unreasonable. While the opinion did not give weighty attention to the constitutionality of street legislation, it evidently presumed such constitutionality. The court probably would have agreed that the municipality had clear authority to regulate the activities of the public forum.

## 2. RELIGIOUS SOLICITATIONS

Anticipating by two decades the federal decisions regarding Jehovah's Witnesses, the Supreme Court of Florida had already set the constitutional law of the state against arbitrary permit ordinances before the first Witness cases confronted the state bench. A wave of such cases washed ashore between 1941 and 1943, and reasoned opinions by the Florida justices advanced the state's law of the public forum.<sup>17</sup>

15. 80 Fla. at 380, 85 So. at 674.

16. The case was *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

17. Especially in the South, where religion was so much a part of the culture, litigation related to religious questions was guaranteed to generate attention.

A controversy under any one of the civil liberties . . . is always accompanied by a jealous truculence, but none can attain that consuming passion which attends every disputation of a question even remotely connected with religion. Men who usually are oblivious and indifferent to the problems before our courts are quick to scrutinize and criticize a comment of the law which contains but a thread of religion being woven into the legal fabric. Emotions, prejudices and passions flare, rendering reasonable men unmanageable, learned men incoherent and resolute men incorrigible.

Comment, *Statute Requiring Permit for Parades on Public Streets*, 21 B.U.L. REV. 540, (1941).

On Jehovah's Witnesses, see Barber, *Religious Liberty v. Police Power: Jehovah's*

C. A. Stephens and his son had brought suit against the city officials of Melbourne to enjoin enforcement of an ordinance which prohibited distribution of literature at specified intersections.<sup>18</sup> The purpose of the law was one of safety and convenience. Automobiles stopped momentarily at traffic lights provided a convenient opportunity for pedestrian solicitors to reach the motorists with handbills and other printed matter, for one was likely to miss these same people by a distribution operation confined solely to the sidewalk. But trotting alongside creeping or halted cars was dangerous, and it was troublesome and inconvenient for motorists to have someone tapping on the glass, or on warm days thrusting an unrequested piece of literature through the open window.

Citing *Hague v. Committee for Industrial Organization*,<sup>19</sup> the Florida Supreme Court noted that although liberty of speech or of the press was one of "the privileges or immunities of citizens of the United States which shall not be restrained or abridged. . .,"<sup>20</sup> man had created his government with the primary duty of preserving human life and safety, so that "guaranteed human liberties may be fully enjoyed, each within its intended sphere of operation."<sup>21</sup> The court reasoned that because the framers of the Constitution did not contemplate that "the exercise of such guaranteed liberties shall jeopardize human life or safety,"<sup>22</sup> the enjoyment of the former depended upon the preservation of the latter. The court stated:

Certainly the constitution does not intend that the exercise of its guaranteed civil liberties shall subordinate reasonable regulations for the preservation of human life and safety. The organic command that no law shall restrain or abridge the liberty of speech or of the press does not by its terms or intendments contemplate that the exercise of such liberty in the distribution of literature to occupants of motor vehicles by persons on foot

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*Witnesses*, 41 AM. POL. SCI. REV. 226 (1947); R. MANWARING, *RENDER UNTO CAESAR* (1962).

Jehovah's Witnesses antagonized the population in the twentieth century much as the Mormons had done in the late nineteenth. The Mormon elders "were regarded as more evil than the carpetbaggers." Enraged citizens "began to tickle them and the converts with hickory twigs." No appellate case resulted from the persecution of the Mormons, for most of the pressure against them was informal or extra-legal, though pressure nonetheless. T. CLARK, *THE SOUTHERN COUNTRY EDITOR* 258, 259 (1948).

18. *Stephens v. Stickel*, 146 Fla. 104, 200 So. 396 (1941). The Melbourne ordinance listed certain intersections.

It shall be unlawful for any person or persons to stand or go upon that portion of the aforementioned street intersections and crossings, commonly used for vehicular or other motor traffic to distribute handbills, pamphlets, dodgers or other literature to the occupant of any automobile . . . or other motor vehicle while said motor vehicle is in motion or while the same is stopped at or near such street intersections and crossings, because of a traffic light, traffic signal, or traffic conditions, or to go thereupon for any other purpose than that commonly accorded to the general traveling public.

*Id.* at 108, 200 So. at 397.

19. 307 U.S. 496 (1939).

20. 146 Fla. at 109, 200 So. at 398.

21. *Id.* at 109-110, 200 So. at 398.

22. *Id.* at 110, 200 So. at 398.



operating within street intersections or crossings shall be superior to reasonable duly authorized regulations of motor vehicle traffic at stated city street intersections for the protection of human life and safety, all other portions of the streets and all sidewalks being open for the exercise of the liberty claimed, as in this case.<sup>23</sup>

The reasonableness of the statute thus depended "upon a full consideration of all pertinent facts affecting the operation of the ordinance and its consequences under controlling law."<sup>24</sup> And the consideration would go beneath the mere language of the law, so that "the organic privilege should not, under the guise of regulations, be in fact and in law unduly restrained or abridged."<sup>25</sup>

This stated, the Florida court remanded the case for further proceedings in which Stephens eventually lost his petition. But won or lost, the Florida justices had elaborated on their decision in *Anderson* in the light of federal rulings such as *Hague* and *Cantwell v. Connecticut*.<sup>26</sup> The court recognized the civil liberties of speech and press but also proclaimed the primary function of streets as one of public passage. Other activities, therefore, took second place to the interest of the public in safety and convenience. Had the reverse been true and the right of speech on the streets primary, public passage would have made way for free speech, and municipal authorities would have been concerned with protecting those politically and religiously committed from the hazards of traffic and the tempers of pestered motorists.

But even with passage coming first, the court considered the exercise of free speech sufficiently important to require that any traffic regulation bearing upon that civil liberty directly relate to motor safety. Recognizing that distribution at intersections represented a rapid, if risky, way to reach a particular segment of the population with one's ideas, the court prophesied that not just any ordinance would pass. The requirement was reasonableness, and the term had endless implications. It was indicated by the Florida court that a statute would fall short of the requirement if the law prohibited sidewalk speech and distribution when evidence of obstruction or danger was lacking. While the primary function of the streets was public passage, no ordinance governing behavior on the streets necessarily took primacy over the constitutional guarantees of free expression.

The conflict between municipal authority and free speech reached the Supreme Court of Florida a second time during that year.<sup>27</sup> Mrs. E. F. Wilson and Grace Shadman sought a writ of habeas corpus following their conviction for distributing literature on the streets without a permit

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Cantwell v. Conn.*, 310 U.S. 296 (1940).

27. *State ex rel. Wilson v. Russell*, 146 Fla. 539, 1 So.2d 569 (1941).

from the chief of the Clearwater police department.<sup>28</sup> The ordinance involved was like the one which the United States Supreme Court had voided in *Lovell v. City of Griffin*<sup>29</sup> three years before, and Wilson and Shadman based their petition on this precedent.<sup>30</sup>

For the Supreme Court of Florida, the petition illuminated in full detail a picture of unconstitutionality. The court found that little elaboration was required:

If so much had not been recently written by the Supreme Court of the United States and become the recognized law of the land, it might be expedient to express our views in regard to the validity of this ordinance at some length, but ordinances of this sort have been considered and discussed in lengthy opinions . . . and such ordinances definitely held to be invalid because of invading the right of free speech and free press as guaranteed under the Constitution, and it appears to us that no useful purpose can be served by attempting to repeat or add to what has been said in that regard by the highest Court in the land. . . .<sup>31</sup>

Justice Chapman, however, thought the case worthy of more detailed discussion. He cited the city's arguments for upholding the ordinance as examples of mass hysteria which stifled freedom during tempestuous times. Clearwater's counsel called the ordinance a war measure, to prohibit the teaching of all doctrines advocating disobedience to the laws of the state. The ordinance also served, supposedly, to suppress those who refused to salute the American flag and who preached civil anarchy. These aims, counsel said, strengthened the national defense posture because they would eliminate the influence of Jehovah's Witnesses in the community.<sup>32</sup>

Chapman felt that Wilson and Shadman deserved more than a discharge from custody. Justice demanded a judicial rebuke to the Clearwater counsel for his arguments and to the city for the ordinance.

These several arguments offered in behalf of the challenged ordinance are weighty and if presented to a legislative body, would not only be influential but convincing, or if made on the hustings would be approved and applauded by the people, but a court in the discharge of duty under our system is required to be

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28. *Id.*

29. The ordinance read: "That from and after the passage of this ordinance it shall be unlawful for any person to distribute pamphlets, circulars, or other similar printed or type-written matter among citizens of the City of Clearwater without first securing a permit from the Chief of Police." *Id.* at 540, 1 So.2d at 569.

Since Jehovah's Witnesses claimed to act upon the direct authority of God, they felt immune to rules of the temporal sphere. To request a permit, even if one was forthcoming as a matter of course, was a violation of principle for them.

30. The *Anderson* decision of 1920 was precedent for the Witnesses, but their counsel stressed the federal cases. Likewise the justices looked to the same and passed over their own landmark opinion.

31. 146 Fla. at 540-41, 1 So.2d at 569-570.

32. *Id.* at 541, 1 So.2d at 570 (concurring opinion).

oblivious to public clamor, partisan demands, notoriety, or personal popularity and to interpret the law fearlessly and impartially so as to promote justice, inspire confidence and serve the public welfare. The liberty and freedom of the press under our fundamental law is not confined to newspapers and periodicals, but embraces pamphlets, leaflets and comprehends every publication which affords a vehicle of information and opinion. The perpetuity of democracy has as a foundation an informed, educated and intelligent citizenry. An unsubsidized press is essential to and a potent factor in instructive information and education of the people of a democracy, and a well informed people will perpetuate our constitutional liberties.<sup>33</sup>

Justice Chapman perhaps liked the Witnesses no more than the Clearwater authorities, but he recognized that at issue was something more basic than one's personal likes and dislikes. At issue were toleration, education, and public advantage.

Clearwater's licensing ordinance fell, and Wilson and Shadman were freed. Lost to significance in the excitement of the moment was the fact that, although the *Anderson* decision of 1920 had held a similar permit ordinance unconstitutional and the United States Supreme Court had made the *Anderson* doctrine applicable throughout the nation in *Lovell v. City of Griffin*<sup>34</sup> in 1938, as late as 1941 the officials in Clearwater administered an ordinance which was contrary to both decisions. The explanation is that pronouncements by the highest appellate courts usually affect at once only the particular case under consideration, but years are often required before a general decision like *Anderson* could make itself felt throughout Florida. A nuisance would appear on the streets, and city fathers would react by legislating a rule outlawed by *Anderson*. Someone would contest the new law, and appellate courts would then bring the older decision from reserve status to active duty. Because of the lag, the *Anderson* ruling did not prevail in Clearwater until the municipality tried to evade the spirit of the most recent decision. And one could only wonder about the prevailing law twenty miles from Clearwater. But the appellate courts of Florida and of the United States had sounded the tone, and communities gradually began to match the pitch.

Other Witness cases involved peddling ordinances which were applied to the persistent street missionaries.<sup>35</sup> The Supreme Court of Florida

33. *Id.* Handing out leaflets to pedestrians was not necessarily pure speech:

A physical gesture must be utilized to make the potential recipient accept the leaflet. The gesture might be misunderstood. Or the passerby might be coerced into taking the leaflet because of the bulk of the distributor. The passerby may feel that he will be cursed or insulted if he ignores the tendered leaflet. Or, taking the leaflet may be deemed a prudent way of avoiding an unpleasant conversation or an unwelcome oral solicitation. The intellectual content of the message has become subordinate to the physical method used to communicate it.

Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U.L. Rev. 177, 212 (1966).

34. 303 U.S. 444 (1938).

35. In the first such case, the Supreme Court of Florida voided the conviction without an elaborate opinion. *State ex rel. Hough v. Woodruff*, 147 Fla. 299, 2 So.2d 577 (1941). The

at first refrained from delivering lengthy opinions on the matter, though it usually voided the convictions. The hesitancy probably resulted from the United States Supreme Court's first decision in *Jones v. City of Opelika*,<sup>36</sup> in which a municipal licensing statute received the approval of a majority. Other federal decisions such as *Lovell*, *Cantwell v. Connecticut*<sup>37</sup> and *Schneider v. Town of Irvington*<sup>38</sup> flowed against the ruling in the first *Opelika* case, and the Florida justices were frankly confused. There seemed to be a kink in the line of constitutional adjudication.

In 1943, a Tampa licensing ordinance came before the Florida Supreme Court for a second bout with Witness counsel.<sup>39</sup> The ordinance levied a tax of fifty dollars on all persons engaged

in the business or occupation of peddling, vending, canvassing, selling or offering for sale in the streets or other public places or from house to house within the limits of the City of Tampa any books, magazines, periodicals or pamphlets.<sup>40</sup>

Freel Singleton had sold literature published by the Watchtower Bible and Tract Society, and the police promptly arrested him. Singleton applied to the supreme court for habeas corpus at trial but before conviction in municipal court.

Justice Terrell wrote the opinion for the Supreme Court of Florida and concentrated on the central question at bar, *viz.*, "whether or not the quoted ordinance is applicable to the sales and distribution of literature relating to one's religious beliefs."<sup>41</sup> For Terrell religious practices were usually legitimate, and as such they could not be detrimental to the safety and convenience of the people at large. The customs and habits of a people conditioned and dictated which public acts would be acceptable.

Every system of law rests on a corresponding system of ethics that directs its course. . . . We are committed to a free exercise of religious opinion but since our system of law rests on Christian ethics one would not be permitted to set up a harem and practice polygamy in Florida under the guise of religious freedom because polygamy is contrary to approved moral standards. If our law were predicated on Mohammedan ethics, the converse would be true. If it were predicated on pagan ethics, I could sell my child as a slave and if predicated on still another system and I belonged to the sect known as Dukhobors, I would be permitted to traverse the highways nude under the guise of religion but not so in our country because our system or moral

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court simply said that the questioned Tampa ordinance licensing peddlers did not apply to Jehovah's Witnesses.

36. 316 U.S. 584 (1942). For comment, see Note, *Freedom of Expression in Noncommercial Publications*, 41 MICH. L. REV. 323 (1942).

37. 310 U.S. 296 (1940).

38. 308 U.S. 147 (1939).

39. *State ex rel. Singleton v. Woodruff*, 153 Fla. 84, 13 So.2d 704 (1943).

40. *Id.*, at 86, 13 So.2d at 705.

41. *Id.*

teaching raises a different standard that the law must conform to.<sup>42</sup>

Law, then, confined religious practices within certain bounds, but the same law gave special preference to the free exercise of religion as one of the civil liberties. And the reason religion and the press were immunized from governmental interference was not difficult to fathom.

The authors of the Bill of Rights descended from ancestors who had been persecuted and condemned to rot in jail for indulging religious and secular beliefs. It took them a thousand years to wrest these liberties from arbitrary kings, hence the inhibition against any attempt to shackle the conscience.<sup>43</sup>

But beyond religion's own peculiar innate value, freedom of religion and religious beliefs served society.

A liberated conscience is as essential to a robust democracy as blood is to the human body. Enslave the conscience and democracy will perish as certainly as the body will perish when the blood ceases to circulate. The church, the press, and the assembly were set apart by the Bill of Rights to educate the mass conscience and give wings to public opinion. But the church and the press were not liberated from governmental interference *carte blanche*; to their liberty was attached an obligation to the public on parity with the freedom given.<sup>44</sup>

Freedom of conscience and religious expression predated Florida's Declaration of Rights and the common law. Justice Terrell gave the doctrine Biblical basis when he noted that "Peter and John first invoked it when they were commanded by the high priest and the Roman rulers to speak and teach no more in the name of the Lord."<sup>45</sup>

So the soil from which it springs like many other cherished precepts of the common law reach [sic] back to Hebrew origin and historically reveal [sic] why a free press, speech, and religion are in a preferred class, protected by the State and Federal Constitutions and immunized from change by the State.<sup>46</sup>

The claims for free exercise of religion extended far into history, though the Tampa civil authorities were no more tolerant of Jehovah's Witnesses in 1943 than the religious leaders of the first century were tolerant of the apostles Peter and John. The difference in the two situations, however, was the recognition by the Florida court that the Witness claims were not only legal but just, and Peter and John, as Terrell would no doubt have admitted proudly, lacked such a sympathetic source of appeal.<sup>47</sup>

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42. *Id.* at 87, 13 So.2d at 705.

43. *Id.*

44. *Id.*, 13 So.2d at 705-06.

45. *Id.* at 88, 13 So.2d at 706.

46. *Id.*

47. The right of free speech on the streets;

Justice Terrell and the concurring justices were adamant on the practical function religion served in society.<sup>48</sup>

Our whole theory of democratic polity as well as law rests on like moral standards and the church is a medium by which they are refined. Social regeneration is not measured by gadgets, sport suits, a chicken in every pot, and two cars in every garage; neither is it inherited like blue eyes and a stomach that will dissolve nails. It is tested by spiritual response, self-discipline, a willingness to sacrifice, and a wholesome respect for the sanctity of the individual, his equality before the law, his abhorrence of privilege, and his right to a place in the sun without which democracy will go pagan and turn autocrat. Herein lies the obligation of the church and the press to point each generation the way to these virtues and failing in this, they fail in their debt to the Bill of Rights.<sup>49</sup>

The state constitution and the Federal Constitution protected these liberties, then, not so much for the value which they possessed in themselves, but for the contributions which they could make to society. The legitimate sphere of operation for both religion and the press was the betterment of society, and presumably when the exercise of these liberties became detrimental to the people, the law would curb their excesses. This position apparently found support on the Florida bench, for the doctrine laid the foundation for the court's famous opinion in the *Pennekamp* contempt case of 1945.<sup>50</sup> But the view would probably not rally too much support from the Justices of the United States Supreme Court, who were less willing to prescribe the betterment for society and were more willing to let the contesters in the forum of public opinion decide what that betterment might be. Open debate and free discussion of one's opinions seemed to the Federal Justices a reasonable way to maintain peace in the community, though to the Florida justices such open discussion was of value only so far as community improvement resulted. And by community improvement, the justices meant improvement according to *their* ideals and values.

Although the Supreme Court of Florida and the United States Supreme Court might not agree completely on the basis of civil liberty, the Federal

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has been hewn piece by piece out of the conflict between the philosophy of the constitution and the necessities, real and fancied, of preserving public order and safety. Issues long dead have contributed precedents upon which modern cases may be decided. Similarly, the turbulence and unrest of today will mold further definitions for the years to come.

Comment, *Limitations on the Right of Assembly*, 23 CALIF. L. REV. 180 (1935).

48. All the justices concurred in the judgment voiding Singleton's conviction, but Justices Brown and Sebring apparently did not concur in Terrell's opinion.

49. 153 Fla. at 89, 13 So.2d at 706.

50. *Pennekamp v. State*, 156 Fla. 227, 22 So.2d 875 (1945). The case involved constructive contempt of court and the rights of free speech and press. The "obligatory" nature of the right of free speech was denied when the United States Supreme Court reversed the Florida justices on appeal. 328 U.S. 331 (1946).

Justices probably would have accepted the judgment of their Florida brethren that the Tampa ordinance as applied unduly restricted religious freedom. As long as the application of the ordinance was unrelated to some legitimate end, the Tampa authorities could not require the Witnesses to pay the license fee.

In other words, one cannot be prohibited from strewing his religious wares up and down the street and from house to house; at the same time one would not be permitted to speak, practice, or distribute under the guise of religion that which endangers public morals or public health nor would one be permitted to speak, practice, or distribute his religious beliefs in places or at times that would endanger public safety and convenience.<sup>51</sup>

The Florida Declaration of Rights and the fourteenth amendment permitted regulations on time, place, and manner of use of the streets in the interest of public safety, but "this must be by general non-discriminatory legislation unhampered by the arbitrary will of any one."<sup>52</sup>

Again, the requirement was reasonableness, but to pass review the ordinance had to be directly related to a legitimate end of government. Cities could govern their streets, and public passage still came first. But given the importance of free expression to society, ordinances which limited or abridged this free expression had to embody good intentions and to reflect a real regulatory need. The Tampa common licensing statute lacked both.

To confer a free exercise of religious profession charged with an obligation like this and then lay a heavy tax on the performance of the obligation when no question of morals, safety, and convenience is involved is contrary to the letter and spirit of the Declaration of Rights. The ordinance drawn in question cannot therefore be enforced . . .<sup>53</sup>

### 3. UNION ACTIVITIES

So far, the ordinances challenged before the Supreme Court of Florida had involved permits, license fees, and general regulation. The court had yet to rule on an absolute and blanket prohibition with respect to the streets, though each previous decision had emphasized the reasonableness which each ordinance should possess.

In 1943, Van Pittman sought a writ of habeas corpus against the officials of the City of Perry. He had violated an ordinance forbidding any union solicitation whatsoever on the streets of the town or in any public or private place.<sup>54</sup> The ban was complete, and the aim obvious.

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51. 153 Fla. at 88-89, 13 So.2d at 706.

52. *Id.*

53. *Id.*, 13 So.2d at 706-07.

54. Pittman v. Nix, 152 Fla. 378, 11 So.2d 791 (1943). The arrest came under section 3 of the ordinance:

That it shall be unlawful for any person, firm or corporation to solicit or attempt

The city officials of Perry wished to discourage union activity in the declining timber industry of their community. Business problems were already overwhelming without further complicating the picture with unions, collective bargaining and higher wages. Just as the Supreme Court of Florida noticed the purpose of the Perry ordinance, it also recalled the rights of free speech and the stated public policy favoring organized labor.

The city could regulate street solicitation in the interest of public safety and convenience, but "there is nothing in the ordinance now before us [the court] which indicates that any of the purposes of the ordinance were to prevent the obstruction of traffic on the streets."<sup>55</sup> Any person or business using the streets was "subject to regulation, and indeed to prohibition if such use renders the use of the streets dangerous to the general public, or impedes the free flow of traffic on the streets."<sup>56</sup> The court could not understand how

this single act of soliciting a man on the street, or in a public park for that matter, to join a labor union and pay a membership fee therein, could in any way prevent the free use of the street, the sidewalks or any other public place in the city by the general public.<sup>57</sup>

Passage was the primary purpose of the streets, but regulations affecting other uses had to be reasonably related to the main function.

Of course if a labor union organizer should take a stand in the middle of a sidewalk or street and stop numerous pedestrians as they came along and vociferously exhort them to join a union, he might become such a public nuisance and create such an obstruction to traffic as might make him subject to arrest under some applicable city ordinance. The same thing might be true of any one who used the sidewalks of a city for stopping and soliciting pedestrians who came along to join any other kind of organization, if his conduct interfered with the free use of the sidewalks by the general public.<sup>58</sup>

Public feeling in Perry and Taylor County was riding high against the labor organizers. Many thought them unpatriotic since their tactics sometimes tended to halt production. Because it occurred during wartime, some people viewed such activity as treasonous. Counsel had applied the patriotic arguments in earlier cases with Jehovah's Witnesses, but, as before, the Court was not impressed.

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to procure on the streets, in public places or on the premises of public or private property within the Town of Perry, Florida, from any person, any money or other thing of value as an entrance or membership fee required as a prerequisite for the joining of or membership in any labor union or other labor organization.

*Id.* at 380, 11 So.2d at 792.

55. *Id.* at 383, 11 So.2d at 794.

56. *Id.*

57. *Id.*

58. *Id.*



The mere fact that labor unions and their leaders some times, even when our country is in the midst of a great war, abuse their powers and privileges, to the great detriment of the general public, should not cause us to deny or impair the well settled legal right of employed workers to organize labor unions and to use their powers of persuasion to induce others to join them, so long as no fraud or coercion is resorted to. But both organized labor and organized business might well remember the ancient maxim, *Salus populi suprema lex est*. In the end, the good of the people as a whole will prevail, and the old maxim referred to, to the effect that "the good of the people is the supreme law," will be vindicated.<sup>59</sup>

By 1943, thanks to the Witnesses and the unionizers, the Supreme Court of Florida was able to construct a logical and viable body of law regarding the public forum. Hostile community feeling and unfriendly ordinances created antagonism which in turn produced litigation for the judicial machinery of the state. The Supreme Court of Florida followed rather closely the leads of the United States Supreme Court, and in a few instances it led the way. Each decision involving the public forum built on the principles established first by the Florida court in the *Anderson* case of 1920. The Witnesses and unionizers permitted the court to sharpen the distinctions and to formulate the law of the public forum regarding permits, licenses, and general regulations and bans. The Florida court exhibited no signs of hesitancy in meeting head-on the constitutional issues presented in each case. In its willingness to grapple with the problems, the Court set policy and made law. If Florida by 1943 was no paradise of freedom for Jehovah's Witnesses, the supreme court of the state nonetheless had done much to improve the climate for them.

#### 4. RACIAL DEMONSTRATIONS

The Witness cases in Florida subsided after 1943. The prophets of doom and salvation no longer seemed quite so persistent or obnoxious as they had before, and communities throughout the state became more tolerant of them.<sup>60</sup> Outside of labor picketing, the Supreme Court of Florida had few occasions to deal with the public forum again until the drive for racial equality created new hostilities and antagonisms, and eventually more litigation.<sup>61</sup>

59. *Id.* at 384-85, 11 So.2d at 794, 95.

60. As for Jehovah's Witnesses, "We were likely to regard the law that had developed as one that concerned a luxury civil liberty. It was a sign of how tolerant toward a sharply dissident minority our society could be, if the minority was small and eccentric." Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, *THE SUPREME COURT REVIEW*, 1965 2 (P. Kurland, ed. 1965).

61. One exception to the rule was a sound-truck ordinance contested by a Miami politician in 1950. Applying *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Supreme Court of Florida found the absolute ban to be a permissible one. The court deemed the operation of sound trucks to be such a nuisance that the city had the authority to ban their use. *State ex rel. Nicholas v. Headley*, 48 So.2d 80 (Fla. 1950).

*a. Absence of Appellate Review*

One would expect to find a gold mine of state appellate decision-making involving the public forum and the Negro movement. The marches and demonstrations produced arrests in many instances, but very few of the cases ever reached either the Supreme Court or the District Courts of Appeal of Florida. While the civil rights movement probably met with less organized and official opposition in Florida than in other southern states, still the public record was filled with incidents. From the plush beach resorts along the coast to the pine woods towns of the northwest, the Negroes strived for better treatment. Why were not the Florida appellate courts as actively involved with civil rights cases as the state's supreme court had been with the Witness litigation ten and twenty years earlier? The absence was puzzling, and explanation speculative.<sup>62</sup>

Explaining the absence of litigation is often more complex than reciting the cause of actual litigation. Several factors, however, probably account for the relative aloofness of the state appellate judges from this social ferment. First, one should remember that appellate cases result from trial litigation, and one would only be stating a truism to say that pressed charges were necessary for this trial litigation. But the truism is important. Police might halt marches, disperse pickets, and dissolve demonstrations without making arrests and listing charges against the participants. The immediate result is the same whether or not litigation eventually comes about—the protest ceases for the time being, and the discontent are unable to proclaim their grievances to the watching world.<sup>63</sup> The police can halt a protest meeting on the street corner without taking anyone to jail. Without a trial, there simply is no case to appeal.

Second, following incidents which did produce arrests and trials, counsels for the Negroes have usually been anxious to transfer the case into a federal district court on the grounds that local police actions have violated federally protected rights of their clients. Regardless of the outcome in the federal system, the cases are often forever removed from state court jurisdiction, and therefore from the possibility of review by the state's appellate courts.

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62. The Florida legislature created three district courts of appeal in 1956 and later increased the number to four. These courts hear most appeals from the trial courts and in most instances are the courts of final resort. See Means, *Florida's District Courts of Appeal*, 33 FLA. B.J. 1208 (1959).

63. The point was a crucial one:  
If freedom of assembly is not protected on the immediate occasion, it stands little opportunity of later vindication. Minority groups are seldom equipped with the requisite funds or influence to render vindication by legal process either consistent or certain. The consequence is a sporadic declaration of the lawfulness of a disrupted meeting, the occasion for which has long passed.  
Comment, *Limitations on the Right of Assembly*, 23 CALIF. L. REV. 180, 191-92 (1935).

The demonstration can be a "pseudo-event" to use Daniel Boorstin's term. That is, the demonstration is aimed not so much at local people as it is for the whole nation, via the mass media. D. BOORSTIN, *THE IMAGE; OR, WHAT HAPPENED TO THE AMERICAN DREAM* 11, 12 (1962).

Third, in those cases which remain in the state court system, local prosecutors sometimes try to make a "deal" with the arrested Negroes so that the state will not have to prosecute on perhaps constitutionally dubious charges. But here, even though the civil rights activists suffer no criminal penalties, the police have been successful in silencing their protest, regardless of the legal justification either for the police action or for that of the demonstrators.

Fourth, a conviction arising from a march or demonstration often might get only as far as the circuit court for the county, and there the judge would likely affirm the conviction. To appeal to a district court of appeal, a writ of certiorari would then be necessary, and the district court could preclude further review simply by refusing the writ. This tool kept many troublesome, emotion-arousing, and politically electric cases from the hands of the appellate courts, and allowed the judges an opportunity to avoid having to make politically unpopular decisions or perhaps to skirt the central issues altogether. Although records were scanty, some informed sources attributed this negative outlook to the district courts, and perhaps one cause in part lay at the ballot box.

The judges were part of an elective judiciary, and despite the absence of successful challengers to the posts at election time, some claimed that the Florida judges were especially conscious of the polling booth.<sup>64</sup> A decade without a successful primary or election challenge was no guarantee that a winning candidate was not around the next curve, waiting for the right politically unpopular decision on which to build a campaign. The judges knew that they had arrived on the bench by appointment, but interviews indicated that they felt vulnerable at the polls. So, given the emotional nature of the race issue, perhaps one could expect the wise and the cunning to avoid the question whenever possible.<sup>65</sup>

#### b. *Racial Economic Pressures*

But elections or no elections, the District Court of Appeals, Second District, reviewed two court orders halting picketing of businesses. In the first case, the Young Adults for Progressive Action picketed B&B Cash Grocery Stores in Tampa, protesting alleged racial discrimination in the hiring policy of the chain, since no Negroes were employed in other than menial tasks. The organization pressed demands for better jobs for the colored, and then issued a threat by letter.

If we have not heard from you by the aforementioned date, we

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64. The story of judicial selection in Florida is available in E. BASHFUL, *THE FLORIDA SUPREME COURT: A STUDY IN JUDICIAL SELECTION* (1958).

65. True, an appointive judiciary in Florida, immune to threats at the polls, might not have produced policy decisions supporting Negroes in their quest for civil rights. After all, appointed federal district judges in the South have not always been anxious to aid the Negro. See J. PELTASON, *FIFTY-EIGHT LONELY MEN* (1961). But removal of the test at the ballot box might have encouraged the state judges to accept more civil rights cases for review, and to decide them on their merits.

shall have no alternative but to bring this matter to the attention of Negro citizens, and ask them to boycott the B & B Supermarkets.<sup>66</sup>

B&B failed to respond affirmatively, and Young Adults commenced picketing which was entirely peaceful. Pickets carried placards reading: "QUALIFIED NEGROES CAN'T WORK HERE. DON'T BUY AT B&B; LETS [*sic*] NOT BUY AT B&B UNTIL WE GET BETTER JOBS." The Negroes also spoke personally to prospective customers, asking them not to enter the stores, though the personal remarks were cordial and without overt threats or coercion. After eight months of picketing, the loss of sales exceeded \$100,000, and the management secured a circuit court injunction against further picketing by Young Adults.

The district court applied a principle essentially culled from the state's labor law of picketing: the doctrine of unlawful purpose. Under this doctrine, as refined by numerous state and federal decisions, even peaceful picketing was enjoinable if the aim or goal of the picketers ran contrary to a statute or to expressed public policy.<sup>67</sup> The doctrine had its birth in an instance where picketing was about to force an employer to break a criminal statute, but in later cases the courts expanded the rule to include picketing contrary to public policy even where there was no criminal penalty attached.<sup>68</sup>

So, in the absence of a statute, the court dictated the proper public policy in the matter, quoting from a federal opinion:

The right to life, liberty, and the pursuit of happiness, includes the right to work and earn an honest living; but it does not include the right to work for any particular individual without the latter's consent. One man's right to work stops short of the other fellow's right to hire him.<sup>69</sup>

B&B Grocery was free to pursue the hiring policy which the management chose, and the power of the state stood behind the store to guarantee its right to this decision. Since the picketing by Young Adults ran counter

66. *Young Adults for Progressive Action v. B & B Cash Grocery Stores*, 151 So.2d 877, 878 (Fla. 2d Dist. 1963).

67. "The unlawful state purpose test was utilized because the majority of the Supreme Court declined to enter the battlefield of labor-management relations." Comment, *Picketing Enjoinable as Interference with Business Relations*, 18 RUTGERS L. REV. 677, 686 (1964).

The Supreme Court of Florida first applied the unlawful purpose doctrine in *Plumbing Local 519 v. Robertson*, 44 So.2d 899 (Fla. 1950). For elaboration, see Gramling, *The Development of Florida Labor Law*, 7 MIAMI L.Q. 188 (1953), and Kanner & Corcoran, *Florida Employment Peace Statute—Compelling Union Recognition*, 4 MIAMI L.Q. 161 (1950). A good summary of the federal cases is contained in Jones, *Free Speech: Pickets on the Grass, Alas! Amidst Confusion, A Consistent Principle*, 29 So. CALIF. L. REV. 137 (1956).

68. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Building Local 262 v. Gazzam*, 339 U.S. 532 (1950); *Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950); *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957). See generally Price, *Picketing—A Legal Cinderella*, 7 U. FLA. L. REV. 143 (1954).

69. *Van Zandt v. McKee*, 202 F.2d 490, 491 (5th Cir. 1953).

to this state policy, the picketing was therefore for an unlawful purpose and enjoined:

For the defendant-appellee to employ negro persons exclusively would not infringe on the rights of the non-colored. B&B is free to pursue its own policy in this respect. Neither should B&B in the management of its own business be subject to the coercive action of a customer boycott carried out by picketing by the concerted action of "Young Adults" because of mere non-employment of Negroes in certain capacities. The freedom of opportunity to do business is to be protected so long as the means are justified.<sup>70</sup>

This declaration of public policy entailed a weighing of public and private interests. There was no mass picketing or violence to cloud the picture, the case being a simple one of limited picketing against a particularly distasteful hiring practice. The court compared the public interest in non-discriminatory hiring with the interest of free hiring, and its decision represented a judicial preference for the latter. The effect reached beyond the Tampa headquarters of Young Adults, for the rule in the Second District would prohibit any picketing whatsoever on the grounds that the employer discriminated against Negroes in his hiring.

The unlawful purpose doctrine recognized that picketing could often be painfully successful. Advocates of the doctrine viewed picketing as free speech plus—that is, speech plus action which combined to focus strong pressure on an employer. In instances where the picketing would force the employer to disobey a law, the doctrine rescued the employer by declaring such picketing out of bounds. Newspaper advertising and word-of-mouth campaigning in the neighborhood to achieve the same unlawful result was not enjoined, however. The theory was that such forms of speech were not so immensely coercive and irresistible as was picketing.<sup>71</sup> Little did Justice Hugo Black realize when he first formulated the unlawful purpose test that a state court some twenty years later would apply a mushroomed version of the doctrine to enforce a policy of racial discrimination in hiring.<sup>72</sup>

The court was able also to draw support from *Hughes v. Superior Court*,<sup>73</sup> in which the United States Supreme Court upheld an injunction against Negro employees who were picketing for proportional representation. But in *Young Adults*, the same issue was not at hand. The Tampa group was not demanding proportional hiring, but hiring on the basis of merit alone. The *Hughes* precedent, then, while marginally relevant, was hardly controlling nor even persuasive.

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70. 151 So.2d at 878.

71. See Fraenkel, *Peaceful Picketing—Constitutionally Protected?* 99 U. PA. L. REV. 1 (1950).

72. The Supreme Court of Florida dismissed the appeal *ex mero motu* without opinion, 157 So.2d 809 (Fla. 1963).

73. 339 U.S. 460 (1950).

In the second economic picketing case, *NAACP v. Webb's City, Inc.*,<sup>74</sup> the Second District again confronted essentially the same problem, with only a few additional variables. The St. Petersburg chapter of the National Association for the Advancement of Colored People began a "selective buying" campaign and boycott against Webb's City, a large drug store concern dealing in general merchandise. The protest began over segregated lunch counters and discriminatory hiring practices and continued for five days until a county circuit court enjoined the picketing.

As in *Young Adults*, the picketers carried their expressive placards:

DON'T BUY WHERE YOU CANNOT WORK ON ANY JOB  
OR BE UPGRADED TO BETTER PAYING POSITIONS.

BUY WITH FRIENDS: MERCHANTS WHO TREAT  
YOU WITH HUMAN DIGNITY

DON'T PAY TO BE SEGRATED [*sic*]. DON'T BUY  
FOR CHRISTMAS. JOIN THE NAACP'S SELECTIVE  
BUYING PROTEST.

DON'T BUY WHERE YOU AREN'T WELCOME.<sup>75</sup>

The St. Petersburg chapter of the NAACP felt that Negroes were not welcome at Webb's City and set about to convince the entire colored community. Up to this point, the strategy was similar to that employed in neighboring Tampa, but here the similarity ended. The Negro protesters used mass picketing and blocked the entrances to the store. Some even threatened potential customers with violence if they entered the store. In addition, many attributed to the NAACP the large number of "undisclosed and unknown" parties who telephoned the store and used obscene and profane language to the switchboard operators. Perhaps the management of Webb's City did not appreciate the colored patrons before the boycott, but sales figures soon demonstrated the effectiveness of the NAACP's campaign. In the five days of picketing during the peak Christmas shopping period, sales totals ran \$10,000 per day under the predicted level.

The county circuit court attached an opinion to its injunction, meeting head-on the constitutional objections lodged against the order by the NAACP:

The Court is mindful of the various rights and freedoms comprehended, expressly or impliedly, within the protective provisions of the State and Federal Constitutions. Among these are the freedom of speech and opinion and the right to protest and to seek personal betterment. Such are the indisputable rights of these defendants and of all other citizens; but personal rights of this character are qualified rather than absolute because the law implicitly requires that individual rights be exercised with due regard for the rights of others who have the right to differ.<sup>76</sup>

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74. 152 So.2d 179 (Fla. 2d Dist. 1963).

75. *Id.* at 180.

76. *Id.* at 181.

Webb's City claimed the right to maintain its own hiring policy, irrespective of demands by Negroes for equal treatment, and the circuit court held that government should preserve the individual's right to operate against even majority opinions:

Under the most liberal judicial concept of our Constitutional system of government there remain, and should remain, some areas in which private individuals and business establishments have the legal right to pursue distinctive policies not wholly acceptable to others, and to resort to the police power of the state for relief against noxious encroachments upon such right.<sup>77</sup>

Thus public policy guaranteed diversity, and the NAACP's picketing was for an unlawful purpose because its aim was contrary to that public policy. Other means of protest, however, were within bounds.

The right to protest the policies of lawful private interests such as the plaintiff's may be exercised within proper limits, for example, through conventional modes of communication or by withholding patronage; but coercive and destructive picketing may be enjoined by a court of equity where, as in this case, there is no adequate remedy at law for continuing and recurring damages.<sup>78</sup>

In *NAACP v. Webb's City, Inc.*, the Second District essentially accepted the position advanced by the circuit court, declaring at the outset that the question was "a racial or social" one and that "the rules of law applicable to labor disputes have no application here."<sup>79</sup>

The public policy was definite and unmistakable: "One's business, aside from the investment of money and tangible property employed therein, is in every sense of the word property, and, as such, if lawful, entitled to protection from all unlawful interferences."<sup>80</sup> The primary purpose of the picketing, as the court saw it, "was to interfere with Webb's City's right to an unhampered market for the sale of its commodities and services . . ." The group approached the goal "by coercing customers or prospective customers into withholding patronage and thereby to cause injury to Webb's City's business . . ."<sup>81</sup>

Relying again on *Hughes v. Superior Court*, the court ruled that racially motivated picketing of a business was illegal because the purpose was essentially unlawful. The court judged lawfulness of purpose by the same process of balancing which it had applied in *Young Adults*:

When considering the plaintiff's interest in its commercial expectancies from its business weighted against the defendants' interest in advancing their social objectives and the injury occa-

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77. *Id.*

78. *Id.*

79. *Id.* at 182.

80. *Id.*

81. *Id.*

sioned by the defendants' coercive picketing causing plaintiff's customers and prospective customers not to enter into or continue business relations with the plaintiff, it appears that the Chancellor has not erred.<sup>82</sup>

Unlawful purpose was the hinge on which the case turned, but the St. Petersburg NAACP also employed massive picketing and some threats of violence. The court could have relied on these unlawful means as partial basis for the injunction. Although it did not, one was left wondering whether the unlawful means somehow influenced the court's judgment of unlawful purpose.<sup>83</sup>

The court secured support for its opinion from sources other than *Hughes v. Superior Court* and the unlawful purpose doctrine. It cited two cases in which picketing with racial overtones had confronted other jurisdictions.<sup>84</sup> In both cases the courts had considered the issue one of public policy, to be determined by a balancing of competing interests. "In each case it was held that the policy of permitting intentional damage to commercial interests in labor disputes should not be extended to racial controversies."<sup>85</sup> With this principle the court ruled in *Webb's City* that racial demonstrations which injured commercial interests were contrary to public policy and—applying the unlawful purpose doctrine—were therefore enjoined.

The decision accorded with the rules in other states which had no legislative or judicial policy requiring racially nondiscriminatory hiring practices. Privilege, the interest given more weight by the court, "is established by a showing that the defendant's conduct will protect or promote an interest superior to that allegedly injured."<sup>86</sup> The rule in effect allowed all but the most innocuous and ineffective racial picketing to be enjoined, without a real showing that the employer's rights were necessarily paramount to those of the picketers.<sup>87</sup>

82. *Id.* at 183.

83. Judge Barns did not say whether the picketing was coercive because of the tactics applied, or because picketing was inherently coercive. If he thought the latter, he would have been in harmony with much judicial opinion prior to *Thornhill v. Alabama*, 310 U.S. 88 (1940). See Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513 (1943). See also Cooper, *The Fiction of Peaceful Picketing*, 35 MICH. L. REV. 73 (1936). Cf., "[T]here is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." *Atchison, T. & S.F. Ry. v. Fee*, 139 F. 582, 584 (S.D. Iowa 1905). Had Barns found only unlawful means, he would have obliged himself to reduce picketing to a lawful level and means, rather than to enjoin it altogether.

84. *Green v. Samuelson*, 168 Md. 421, 178 A. 109 (1935); *A.S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y.S. 946 (Sup. Ct. 1934).

85. Work, *Injunctive Relief for Economically-Directed Civil Rights Picketing*, 38 U. COLO. L. REV. 516, 534 (1966).

86. Note, *Racial Employment Picketing: Availability and Extent of Injunctive Relief*, 51 MINN. L. REV. 92, 107 (1966). For elaboration, see W. PROSSER, TORTS, §§ 123, 124 (3d ed. 1964).

87. Employers have complained that if picketers' demands were allowed, they would be denied free choice in hiring. On the other hand, Negro picketers have asserted that they were attempting to advance their race socially and economically, by procuring equal opportunities for employment. Thus, picketing can inform the



The NAACP appealed the decision, and the United States Supreme Court granted certiorari.<sup>88</sup> However, while the case was pending before the Supreme Court, Webb's City de-segregated the lunch counters, and bargaining teams had reached an understanding on hiring policies for the store. Thus the district court's order was vacated as moot.<sup>89</sup>

### B. *Restricted Areas of Public Property*

The cases from Tampa and St. Petersburg represented instances in which Florida appellate courts accepted review of public forum cases arising from racial disputes. But, as previously noted, there were scores of other cases which neither a district court nor the supreme court of the state ever fully reviewed. One of these, *Adderley v. Florida*,<sup>90</sup> eventually reached the United States Supreme Court.

A group of Negro students from the Florida A & M University in Tallahassee held a demonstration at the Leon County jail, about one mile from their campus, to protest the arrest of some of their number following "sit-ins" at Tallahassee theaters. About two hundred marched from the school and arrived at the jail singing and clapping. They went directly to the jail door where they were met by a deputy sheriff, presumably surprised by their presence. He asked them to move away from the entrance, and they did partially, though still blocking the jail driveway. This driveway handled little public traffic, but the sheriff used it when transporting prisoners to and from court. The sheriff appeared on the scene and gave the Negroes ten minutes to clear the premises. A local minister accompanying the demonstrators instructed those who wished to be arrested to stay in their places. After ten minutes, the sheriff took the remaining 107 persons into custody.

The Leon County Circuit Court found Harriett Louise Adderley and thirty-one others guilty in one case of trespassing "with a malicious and mischievous intent" upon the premises of the county jail.<sup>91</sup> The demonstrators unsuccessfully petitioned the District Court of Appeal, First District for a writ of certiorari; the district court simply opted out of a review of the conviction, leaving the matter for the highest court in the land.<sup>92</sup>

By a vote of five to four, the Supreme Court speaking through Justice Black affirmed the convictions by the state circuit court. The majority felt

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public of the employer's practices and the prospective patron can then compliment or criticize, and the employer can act accordingly.

Note, *Racial Picketing Protesting Discriminatory Employment Practices*, 18 U. MIAMI L. REV. 488, 494 (1963). See Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

88. NAACP v. Webb's City, Inc., 375 U.S. 939 (1963).

89. NAACP v. Webb's City, Inc., 376 U.S. 190 (1964).

90. 385 U.S. 39 (1966).

91. *Id.* at 42.

92. *Adderley v. Florida*, 175 So.2d 249 (Fla. 1st Dist. 1965).

that the Constitution did not require the state to make all public places available for protests and demonstrations:

The sheriff, as jail custodian, had power, as the state courts have here held, to direct that this large crowd of people get off the grounds. There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses. . . . Nothing in the Constitution of the United States prevents Florida from evenhanded enforcement of its general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to a curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.<sup>93</sup>

The Supreme Court thus affirmed the right of a state government to close certain pieces of public property to the exercise of free speech. A street was one thing, and the county jail quite another. But one wonders whether the Leon County Sheriff would have taken action against the students had they not been colored and associated with a civil rights protest. On the other hand, it is doubtful whether another group in Tallahassee, more acceptable to public opinion, would ever march on the county jail.

The four dissenters voiced the belief that the state should make way at all times for free expression of opinion. As Justice Douglas vehemently pleaded:

The jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself . . . is one of the seats of government whether it be the Tower of London, the Bastille, or a small county jail. And when it houses political prisoners or those whom many think are unjustly held, it is an obvious center for protest. The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor.<sup>94</sup>

The *Adderley* case illustrates the change in the type of controversial groups seeking access to the public forum in recent years. The Jehovah's Witnesses and even the labor organizers were usually few in number when they demanded use of the streets or other public places. The drive for Negro equality, however, relied for reasons of emotion and support almost

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93. 385 U.S. at 46-7.

94. *Id.* at 49-50.

exclusively on the mass march or the mass demonstration. The *Adderley* cases involved no single Jehovah's Witness attempting to save some lost souls at the county jail. Several hundred persons, instead, were on hand for the protest, and regardless of the legal principles advocated by the opposing sides before the Supreme Court, each admitted that numbers did make a difference.

Faced with mass participation in Negro efforts to climb the scale of equality, some judges like Black responded by advocating the primacy of state power to regulate the use of public places, with fair application and no evidence of discrimination. The other side, also faced with the reality of the massiveness of the Negro protest, was more than willing to extend first amendment protection to the street activities of civil rights activists. Douglas would have extended the principles of the Witness cases to cover mass marches and sidewalk demonstrations. The *Adderley* case, then, was concerned with the prominent theme of any discussion of the public forum: whether a state can declare streets or other public property off-limits for certain activities including speech.

The position represented by Justice Douglas probably would not deny communities the authority to regulate the time, place or manner of street protests, unless the regulations themselves work to the distinct disadvantage of certain groups. Because success in the civil rights movement is believed to depend in great part upon mass action, Douglas would closely scrutinize statutes which severely curtail numbers or areas for demonstration. While in fact equally applicable to all, such laws primarily would handicap those who rely upon mass participation as a base for power and publicity. Black, on the other side, would grant full discretion to municipalities to determine the use of streets and other public places, so long as enforcement is neither arbitrary nor unequal. While treating all groups alike, such authority might actually permit cities to remove one of the pillars of support from the civil rights program—that of mass action.<sup>95</sup>

### III. CONCLUSION

Historically, Florida appellate courts have placed the state's law of the public forum somewhere between the extremes represented by Black and Douglas. From the *Anderson* case through the Witness decisions of the 1940's, the Supreme Court of Florida generally permitted restrictions on the public forum only when the regulations facilitated public passage. Absolute bans were unconstitutional unless the municipality could demonstrate a reasonable relation between the ordinance and a legitimate

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95. It was Black's opinion in the *Adderley* case which disturbed Emerson. "[T]he government can cut off at will all meetings, marches, parades, demonstrations, canvassing, picketing and similar activities that utilize public space. Or, if the government chooses to permit such use, it can limit the privilege in any way it sees fit provided it does not act arbitrarily or show discrimination." Emerson, *The Court v. The Demonstrators*, 22 THE NATION 704, 705 (1966).

purpose it would operate to serve. But the social implications and the massiveness of the civil rights movement drove many Florida judges to reconsider past views, as there is a distinct difference between a solitary Witness distributing religious literature and five hundred emotionally charged Negroes parading through the courthouse square in a drive for society's radical transformation.

The legal summary is interesting, but the case studies reveal more than substantive law. The justification for a study of state courts, as this article has shown, lies in the fact that these institutions make important political, *i.e.*, policy, decisions. Furthermore, since the behavior of state courts does not necessarily correspond to that of the United States Supreme Court, separate studies of the former are needed if one is to improve his understanding of the judicial process and of the administration of justice within the United States.

State appellate courts differ from the United States Supreme Court in a crucial respect. The former are subject to review by the latter on federal questions, while the latter is subject to review only by non-judicial institutions such as Congress and national public opinion. During recent years the Supreme Court has accepted review of topics in the field examined in this article, thus removing the state courts from a position of "finality." But accompanying the existence of federal review in the area of free expression is a related problem: Supreme Court pronouncements of the law of the public forum become applicable to the individual litigant only if the state courts give effect to the doctrine. If the Supreme Court serves as commander of the advancing body of federal law, the effectiveness of the entire unit depends upon the loyalty of the state courts as subordinates following its lead.

A study of state judiciaries where a possibility of federal review is present, becomes, in a sense, a study of law in action as received and of law as administered. This study has yielded a series of hypotheses and near-definite conclusions about state courts. In the latter category, one may make particular statements about state courts with the great likelihood that future studies would almost certainly demonstrate these points to be true. In the former category, tentative conclusions or hypotheses are apparent which may or may not apply to other state courts. That is, additional studies will be necessary to demonstrate whether the statements in the first category are unique to the appellate tribunals of Florida.

Perhaps a conclusion almost too obvious to mention is that state courts influence public policy. Cases in the public forum brought community custom into the judicial conference. In Florida, almost without exception, appellate litigation in this field of law resulted from community efforts to silence pests, undesirables and perceived social threats, and the degree to which the judges shared such attitudes made the constitutional path of free expression a rough one. Floridians learned to live with their eccentric Jehovah's Witnesses. Racial difficulties of recent years, how-

ever, sparked only occasional words from the appellate judges, and generally these opinions did not encourage widespread use of public places by those protesting racial injustices. As noted, the factors of race and numbers colored the usual arguments for free expression—the judges watched a social revolution with which they were for the most part in disagreement, and they saw hundreds of demonstrators in place of the enthusiastic workers for the Lord who in groups of two and three pestered communities twenty or more years ago. Here, the dominant judicial attitudes were only representative of majority white opinion in the state.

Second, vagueness in a judicial test increases the probability of varying and unequal applications of that test. A judicial test is a standard for deciding a particular type of litigation, and generally an appellate court determines the test for trial courts to follow. If the standard is unclear, a trial judge may be uncertain of the appellate court's intent and may be left with his own interpretation of the words and meaning of the test. Vagueness permits varied application if a trial judge dislikes a test and desires to dilute the doctrine. And vagueness almost assures varied application because even sincere and dedicated trial judges may interpret the standard in several different ways in their efforts to divine the intent of the appellate bench.

A third point which this article demonstrates is that the presence of litigation is a *sine qua non* of positive policy impact by state courts. Before a court can act, there must be a case. Without cases, a court does nothing, and its impact on public policy is therefore a negative one. Again, the point is an obvious one from the study, but it is a factor which one must consider in determining the role of state courts in the American political system.

In addition to these three points, this article has uncovered several hypotheses or tentative conclusions about the operations of state courts. These are "tentative" because they may not apply to all, or even to most, state courts. While each one is an accurate description of the workings of the Florida courts, it can only be suggested that they characterize the courts of other states.

First, the cases studied indicate that application by a state court of United States Supreme Court doctrine can be much less than enthusiastic when the state judges are apparently in strong disagreement with their brethren on the supreme bench. State judges may simply refuse to apply the higher doctrine, or even if they recognize the relevant federal doctrine, their application of it may in fact reflect the spirit of an older and rejected rule.

Second, a state appellate court's view of the appellate function is related in part to the issues which confront it. The Florida courts exercised rather broad review power in the Jehovah's Witnesses cases but seemed hesitant to reverse the lower courts in cases involving racial picketing and demonstrations. In the latter instances, did they do so out

of a conscious feeling that the greatest amount of discretion should rest with the trial judge, or because a limited appellate role would, more often than not, affirm the convictions of the civil rights activists? The point is that a student of state courts should beware lest an advocate of a limited appellate function hide more basic policy aims. Perhaps a more thorough study of a single court might examine the actions of the judges with respect to all cases to see whether the concept of limited role applies in one field as it does in another. Though personal policy preferences undeniably play a part in judicial decision-making, one judge could conceivably subordinate policy choices in every area to one all-encompassing value preference regarding the role of his court. With respect to Florida, however, the evidence from cases and interviews indicated that the judges tended to advocate a limited review function in racial cases in part because a restricted appellate role served their policy choices.

Third, the elections are a factor which tend to encourage state courts to avoid review of emotionally explosive issues on their merits. Regarding racial cases in Florida, interviews strongly suggested that the factor of an elected judiciary was important in instances where, if the courts ruled on the merits or accepted a case for review, they might be required to rule contrary to a strong majority opinion. Several judges frankly admitted that the possibility of strong opposition and perhaps defeat at the polls were incentives to by-pass review on so heated a topic as race.

This study of the public forum in Florida represents an attempt to gain insights into the operations of state courts as participants in the American political system. The opportunities for further research are vast, and, given the influence which the appellate courts can have upon policy within a state, students of politics interested in the interpretation and application of legal rules within society have fifty fertile fields of study. The story of the public forum in Florida presents a sort of legal interdigitation of emotions, motives, rules and actions. Curiously, one has an image of a circular game of cause and effect which builds and magnifies the situation until it is like a blown-up photograph—grotesque, fascinating, somewhat undefined, and challenging.